

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ANDREW J. GUILFORD, JUDGE PRESIDING; COURTROOM 10D

CERTIFIED TRANSCRIPT

United States of America,)	
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Plaintiff(s),)	
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vs.)	No. SACR 06-129-AG
)	
)	
Edward Showalter,)	
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Defendant(s).)	
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REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS
SANTA ANA, CALIFORNIA
WEDNESDAY, MARCH 30, 2011

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U.S. DISTRICT COURT REPORTER

A P P E A R A N C E S

033011 DCCD GUILFORD 10D SHOWALTER
SACR 06-129-AG

IN BEHALF OF THE
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1 SANTA ANA, CALIFORNIA; WEDNESDAY, MARCH 30, 2011

2 THE CLERK: SACR 06-129-AG: U.S.A. v

3 Edward Showalter.

4 MR. STOLPER: Good afternoon, Your Honor.

14:35 5 Andrew Stolper on behalf of the government.

6 MR. STEWARD: And, Your Honor, Dean Steward on

7 behalf of Mr. Showalter. He's present in custody.

8 THE COURT: All right. Good afternoon to counsel

9 and good afternoon to you, Mr. Showalter.

14:35 10 Who would like to tell me what they would like to
11 accomplish today?

12 MR. STEWARD: Your Honor, I'll start.

13 THE COURT: Okay.

14 MR. STEWARD: What we're ultimately requesting is
14:35 15 that the court allow Mr. Showalter to withdraw his guilty
16 plea and set the matter for trial, and we would also be
17 requesting that the case go back to the wheel for random
18 reassignment here in the Southern division.

19 That's what we're asking for.

14:36 20 THE COURT: All right. Now -- all right, go ahead
21 and tell me why.

22 MR. STEWARD: Yes, Your Honor.

23 I don't think the government can cogently argue
24 that they haven't breached the plea agreement.

14:36 25 It's a fundamental portion of the agreement itself.

1 The government recommended 16 months, higher than the low
2 end, and I just don't think they have any argument that they
3 did not breach.

4 The government's response to date has been:

14:36 5 Mr. Showalter breached, so it's okay if we breached.

6 First, as we set out in our reply, we don't believe
7 Mr. Showalter breached; but assuming for just a moment that
8 he did, the government still cannot breach the plea agreement
9 by unilaterally deciding that it has been breached.

14:37 10 There is case law, and we cited the *Guzman* case out
11 of the Tenth Circuit at Page 3 of our reply and, more
12 importantly, the terms of the plea agreement itself require
13 at Paragraph 17, Page 8 that there be a judicial
14 determination that a breach has occurred.

14:37 15 That didn't happen, obviously, when Mr. Showalter
16 was originally sentenced and therefore the government is not
17 relieved of their responsibilities in the absence of such a
18 determination by the court.

19 I believe Mr. Stolper's comment in his papers was
14:38 20 something to the effect of it would have been a wiser course
21 to have run this by the court, but the clear language in the
22 plea agreement says that the only time this plea agreement
23 can be officially, if you will, breached, is when the court
24 has made such a determination. And, as we know, that has not
14:38 25 happened.

1 In terms of the other portions of -- of -- of the
2 requests that we've made, *Santobello* is the basis for them,
3 for example, the need for a different court.

4 The *Santobello* case talks about appearances and
14:38 5 talks about just fundamental justice and, again, I think each
6 and every one of the cases that discusses *Santobello* says
7 it's not the fault or in any way imputed to the court; it's
8 the government's breach that's the problem.

9 THE COURT: That's okay. Don't worry about that.

14:39 10 MR. STEWARD: Thank you, sir.

11 THE COURT: Take your best shot. I welcome you to
12 do so.

13 I'm glad you have obtained some clarification at
14 the Ninth Circuit that I'm prepared to respond to. Don't be
14:39 15 shy.

16 MR. STEWARD: Well, Your Honor, frankly, for me
17 it's somewhat easy in that I wasn't a part of all of this, so
18 I can throw rocks at defense counsel, Mr. Stolper, quite
19 easily.

14:39 20 THE COURT: Throw them at the court too is what I'm
21 inviting you to do.

22 MR. STEWARD: Thirty-two years of doing this,
23 Your Honor, the words will not come out of my mouth.

24 But, in any event, the bottom line is that the
14:39 25 government's breach is clear. They have not given the court

1 any theory to support the fact that they didn't breach, and
2 so, in our view now, the key is the remedy. Our view is the
3 remedy is assignment to another court and the allowance of
4 the withdrawal of the guilty plea and Mr. Showalter would
14:40 5 then request a jury trial.

6 THE COURT: All right. Thank you, Mr. Steward.

7 Mr. Stolper.

8 MR. STOLPER: Thank you, Your Honor.

9 The government's not going to go through and
14:40 10 identify all the various ways the defendant breached the
11 agreement beforehand. Instead the government's going to
12 focus instead on the plain language of the plea agreement,
13 and that's Paragraph 16, which is different than the breach
14 part of the agreement. And I'll just direct the court to
14:40 15 the -- there's different remedies associated with different
16 parts of the agreement.

17 In Paragraph 16 it sets forth the US -- the
18 United States attorney's obligations and it prefaces
19 Paragraph 16 by saying "if Defendant fully complies with all
14:40 20 of Defendant's obligations under this agreement, the USAO
21 agrees to do certain things.

22 That means, Your Honor, that the USAO's obligations
23 in Paragraph 16 only arise if Defendant complies fully with
24 all of Defendant's obligations under this agreement."

14:41 25 There is no requirement with respect to

1 Paragraph 16 that the government requests the court to
2 declare a breach or asks the court to declare a breach, and
3 the reason that is the case, Your Honor --

4 THE COURT: What about Paragraph 17, Line 20?

14:41 5 MR. STOLPER: I'll come to that in a second,
6 Your Honor.

7 THE COURT: -- Line 21.

8 MR. STOLPER: And Paragraph 17 is the breach
9 language -- it's the breach provision, but there's different
14:41 10 remedies under different things the Defendant can do under
11 the plea agreement the parties signed.

12 Under Paragraph 16 all the government can do is not
13 recommend a low-end sentence. That's the only thing that
14 happens. Our obligation to recommend a low-end sentence, our
14:41 15 obligation to abide by our sentencing stipulations and our
16 obligations to recommend departure or acceptance of
17 responsibility, those don't arise.

18 The remedies under Paragraph 17, if there is a
19 judicially declared breach, are quite different. At that
14:41 20 point in time, there is a whole set of things that can happen
21 to the defendant, including indicting him for additional
22 charges, tolling of statute of limitations, all types of
23 other remedies that are then triggered by a technical -- by a
24 breach of the agreement.

14:42 25 And so, Your Honor, coming back to the --

1 Paragraph 16, the only real question is did the defendant
2 fully comply with his obligations?

3 THE COURT: All right. Okay.

4 You're firmly embracing the first line of
14:42 5 Paragraph 16.

6 MR. STOLPER: Yes.

7 THE COURT: I can see why you might.

8 Was that an argument in your papers?

9 MR. STOLPER: It was, Your Honor.

14:42 10 THE COURT: Show me where that -- show me where
11 you're embracing 16.

12 MR. STOLPER: Certainly, Your Honor.

13 (Pause in the proceedings.)

14 MR. STOLPER: Page 5, argument, first letter A:
14:42 15 "The government's obligation to recommend a low-end sentence
16 never arose."

17 And then I wrote, Your Honor: "By the terms of
18 plea-agreement contract, the government's obligation to
19 recommend a low-end sentence arises only if, quote, the
14:43 20 defendant complies fully with all of Defendant's obligations
21 under the agreement.

22 THE COURT: And what line is that on, on Page 5?

23 MR. STOLPER: Page 5, Line 22. It's our first
24 argument, Your Honor.

14:43 25 THE COURT: Well, I don't see you making -- it's

1 not significant, but I don't see you making this distinction,
2 this big distinction you're now making, between Paragraph 16
3 and Paragraph --

4 MR. STOLPER: 17.

14:43 5 THE COURT: -- 17.

6 MR. STOLPER: I probably should have made it more
7 crystal clear.

8 THE COURT: Okay. I got it.

9 MR. STOLPER: But there is a very meaningful
14:43 10 distinction between those two things because of the remedies
11 that are triggered.

12 But, Your Honor, there's another way -- but that's
13 the government's first position which is -- and I don't --
14 contrary to what Defendant's arguing, I don't think there's
14:43 15 any legitimate dispute that the defendant breached the plea
16 agreement or didn't live up to his obligations in any number
17 of ways prior to any government sentencing recommendation,
18 and I can -- I won't go through them with the court but if
19 the court would like me to, I'm happy to.

14:44 20 That's the government's first position.

21 The second position is, let's assume, for the sake
22 of argument, that the court is now asked to determine whether
23 or not a breach of the plea agreement took place, and it
24 would have to determine on both sides, did the defendant
14:44 25 breach the plea agreement? Did the government breach the

1 plea agreement?

2 And it would also have to determine when did that
3 breach take place? And the reason that's significant,
4 Your Honor, is if the court were to determine that the breach
14:44 5 took place prior -- by the defendant, prior to the
6 government's sentencing position, then not recommending a
7 low-end sentence, then, as a matter of contractual
8 interpretation, the government would have then been relieved
9 of its obligations. And Mr. Steward is correct that it would
14:44 10 have been error for the government to have gone ahead and
11 breached the agreement without declaring a judicial --
12 without asking the court, and the court so declaring a
13 judicial breach, but as you play it through, Your Honor, as
14 you play the song through to the end, the outcome is exactly
14:45 15 the same.

16 If, in fact, the court determines that the
17 defendant breached the agreement, then the government is, in
18 fact, relieved of all of its obligations, and to the extent
19 the government failed to obtain judicial -- the judicial
14:45 20 declaration of a breach then and does so now, in the end the
21 result is the same, which is the government is relieved of
22 its obligations to recommend anything under this plea
23 agreement, and if that type of breach were declared, the
24 government would have the opportunity, if it wished, to bring
14:45 25 additional charges and -- and -- and have additional remedies

1 as set forth in the breach portion of the plea agreement.

2 THE COURT: So you have your "cake" of a guilty
3 plea and no trial, and "you're eating it too" without having
4 to recommend a low-end?

14:45 5 MR. STOLPER: That's correct, Your Honor, because
6 this was our -- our "cake" was not just a "no trial," our
7 "cake" was certain specific stipulations that the defendant
8 was going to follow.

9 The plea agreement was not simply the defendant
14:45 10 waives his right to trial, it was a set of -- the defendant
11 agreed to certain things under the agreement, including
12 certain punishment.

13 He agreed that he committed certain amount of loss,
14 he agreed that he -- that he -- you know, he agreed to a
14:46 15 certain number of victims. And the defendant, before the
16 government ever opened his mouth on any of these topics took
17 the position that there was no loss, that there were no
18 victims.

19 THE COURT: Yes, but due to my ruling, you got
14:46 20 virtually all the benefit of that, of those promises made by
21 the defendant, paying only the cost of some extra work in
22 responding to his later claim of not guilty.

23 MR. STOLPER: Well, Your Honor, it's -- it's -- and
24 of course the appeal on all those questions, but I understand
14:46 25 the court's point, which is --

1 THE COURT: Well, wait. What were the conditions
2 in the plea agreement concerning waiver of appeal?

3 MR. STOLPER: The defendant waived his right to
4 appeal.

14:46 5 THE COURT: Pardon?

6 MR. STOLPER: The defendant did an appellate waiver
7 as well.

8 THE COURT: But he did appeal?

9 MR. STOLPER: Correct, Your Honor.

14:47 10 I don't want to get -- to get bogged down on this,
11 but the -- I guess the government's perspective on all of
12 this is what the government bargained for at the time the
13 defendant came in and pled guilty was certain sentencing
14 stipulations and certain other things. And the government,
14:47 15 ordinarily, as the court knows, the parties come in and they
16 just say, these are our stipulations and this is where we
17 come out.

18 THE COURT: Okay. Well, speaking of appeal, why
19 aren't the arguments made by Mr. Steward deemed "waived" on
14:47 20 appeal?

21 MR. STOLPER: Your Honor, I -- it's an interesting
22 question.

23 They were not raised on appeal, but that said, we
24 are now back in district court, and I think the district
14:47 25 court, again, is -- is facing a resentencing, and based upon

1 that it's -- we couldn't find -- I couldn't find any law to
2 suggest -- and I'm not saying I couldn't find it -- but I
3 couldn't find any law to suggest that merely because he
4 didn't raise it in his initial appeal he's not allowed to
14:47 5 raise it when it's on remand back to the district court.

6 I -- I do think it's an interesting commentary on
7 the history of this case, Your Honor, that at the time we did
8 the sentencing and at the time of the appeal no one
9 legitimately thought that the government should be obliged to
14:48 10 recommend a low-end sentence given that the defendant took
11 the position that -- given that the defendant didn't follow
12 any of his agreements under the plea agreement.

13 I mean, I guess, going back to the court's earlier
14 question, it -- it -- from the government's perspective it's
14:48 15 fundamentally unfair that we're obliged to follow the
16 sentencing stipulations in the plea agreement but the
17 defendant can self-absolve.

18 And the fact that it turned out that the government
19 stipulations that we agreed to in the beginning were correct
14:48 20 is of little comfort to the government because instead of it
21 coming to this court as a joint recommendation, the
22 government, as the court -- as the court well knows, had to
23 fight tooth and nail on every part of this sentencing, and
24 that's -- you know, if you want -- if you want to consider
14:48 25 this from a "fairness" perspective, the defendant got to have

1 his cake and eat it too inasmuch as the defendant, you know,
2 was going to plead guilty and then did plead guilty, and then
3 the defendant got to back out of all of the sentencing
4 stipulations and put the government to its paces on all of
14:49 5 those questions, and the fact that he ultimately lost on
6 those questions is fairly irrelevant from the perspective of
7 the fairness of this agreement.

8 You know, these were sentencing -- sentencing
9 stipulations. The defendant absolutely violated them and I
14:49 10 don't think it's fair for the defendant now to come into
11 court and say, even though I'm not obliged to follow the
12 sentencing agreements, you do.

13 And from the government's perspective we think that
14 Paragraph 16 pretty much controls on this question.

14:49 15 Like I said, I don't think it's a legitimate
16 question that he didn't fully comply with his obligations
17 under the agreement; and if that's the case, our obligations
18 on sentencing just never arose.

19 THE COURT: Disparity is something I should always
14:49 20 be concerned about; correct?

21 MR. STOLPER: Absolutely, Your Honor.

22 THE COURT: And are you aware what this court did
23 in the case of Assistant Sheriff Jaramillo?

24 MR. STOLPER: From what I read in the paper,
14:50 25 Your Honor, which may not be the best account.

1 THE COURT: Well, for the record, I'm thinking
2 about this case and issues of disparity. Go ahead.

3 MR. STOLPER: In terms of sentencing or in terms of
4 what we're doing here today?

14:50 5 THE COURT: Sentencing.

6 I believe there was a guilty plea and I believe one
7 of your colleagues decided that Mr. Jaramillo was not true to
8 his commitment and I believe your colleague did not make a
9 low-end recommendation.

14:50 10 MR. STOLPER: Yeah, Your Honor, I just --

11 THE COURT: Okay. Go ahead.

12 MR. STOLPER: I'm sure you're correct, and I don't
13 feel comfortable speaking on that because I'm not privy to
14 all the facts and circumstances.

14:50 15 THE COURT: Okay.

16 MR. STOLPER: And I don't know if my colleague
17 declared a breach or not in that particular case. But in
18 this case, under this plea agreement, and this is a matter of
19 contractual interpretation, our obligation -- the
14:50 20 government's obligation to recommend low-end only arises if
21 the defendant fully complies. And unless the defendant --
22 and I think the record here is extremely -- is exceptionally
23 clear that he did not fully comply with his obligations,
24 didn't substantially comply with his obligations. In his own
14:51 25 words he repudiated his obligations, and for the government

1 to now be required to recommend low-end, when the defendant
2 could basically walk away from the plea agreement is not
3 consistent with the language of the plea agreement, is not
4 fair and should not be the outcome.

14:51 5 THE COURT: All right. Anything further?

6 MR. STOLPER: No, Your Honor.

7 Thank you.

8 THE COURT: All right. Any response, Mr. Steward?

9 MR. STEWARD: Yes, Your Honor, if I may, briefly.

14:51 10 What I didn't hear there is Mr. Stolper's admission
11 that the government breached this plea agreement. I don't
12 think he can say other than that they did.

13 His argument about Paragraph 16 and 17, I think, is
14 a little misleading and -- for contract reasons. I have to
14:51 15 admit my contract training is rusty. I think I last had
16 anything to do with contracts in about 1974 in the first year
17 of law school.

18 THE COURT: Well, of course, you've had something
19 to do with contracts every time you engage in a plea
14:52 20 agreement, but not like contracts.

21 MR. STEWARD: That's true, Your Honor.

22 And more importantly, here, in reading the other
23 cases that cite *Santobello*, there's a lot of discussions
24 about these, and I think it's clear that a plea agreement,
14:52 25 being a contract, has to be read as a whole, and what

1 government counsel is trying to do is to parse this, which
2 gives it a meaning that I don't believe is a fair reading of
3 the entire agreement.

4 I believe that you have to read Paragraphs 16 and
14:52 5 17 together, along with all of the other paragraphs in the
6 agreement in order to understand what the parties agreed to.

7 And Mr. Stolper's terms of Paragraph 16 utterly
8 ignores Paragraph 17 and the judicial determination, because
9 if it was the way that Mr. Stolper urges, then Paragraph 17
14:53 10 and its need for judicial determination would be a nullity,
11 it would be something that would not be necessary at all, and
12 I think it's clear from the meaning of this, clear as it's
13 written, that 16 and 17 must be read together.

14 I do agree with Mr. Stolper about the potential
14:53 15 waiver. I did not see any case that talked about that.

16 I think we're in sort of a unique factual posture
17 and that may be the reason. But what we find now is that we
18 have sentencing set at the end of next month and the
19 operative document is still this plea agreement. So at this
14:53 20 point, even if there was a waiver in the Ninth Circuit and a
21 waiver of prior counsel, we've brought it up now and it's
22 still an operating document, it's something that -- that's to
23 be considered at the time of sentencing, unless the court
24 allows us to withdraw from it.

14:54 25 THE COURT: That's a good argument.

1 MR. STEWARD: Although I don't really think --

2 THE COURT: Although you don't escape waiver by
3 changing lawyers.

4 MR. STEWARD: No. I believe that's true,
14:54 5 Your Honor, you do not.

6 However, the keynote here is that once the Circuit
7 sent the case back down, as we approached sentencing, the
8 plea agreement is still in force and effect until the court
9 says otherwise, and so right now it's a document that we
14:54 10 think is defective and we're asking the court to allow us to
11 withdraw from.

12 And, Your Honor, beyond that, I would submit. I
13 would particularly note, though, *Santobello* itself, which I
14 thought was a great -- a terrific Supreme Court case, and the
14:54 15 *Peglera*, P-e-g-l-e-r-a, case, which is a 1994 case out of the
16 Fourth Circuit, I thought was remarkably close in facts to
17 our case, including the government's breach, there being they
18 didn't recommend the low end as they were supposed to, they
19 recommended a higher sentence than that.

14:55 20 THE COURT: All right. Anything further?

21 MR. STOLPER: Your Honor, just one --

22 THE COURT: Please.

23 MR. STOLPER: -- point in response to what
24 Mr. Steward said.

14:55 25 As I understand Mr. Steward's argument, if this

1 is -- whether it was waived or not, now that we're back in
2 district court, this is still the operative document.

3 If that's the case, Your Honor, then the
4 government -- if that's the theory under which the court's
14:55 5 going to proceed, then the government would respectfully
6 request that the court declare a breach of the defendant
7 based on his prior positions so it's no longer the operative
8 document.

9 As we stated before --

14:55 10 THE COURT: You are declaring a breach; correct?

11 MR. STOLPER: We are declaring a breach and
12 requesting the court to so find, yes, Your Honor, based on
13 the information set forth in our papers.

14 THE COURT: Are you declaring a breach or
14:55 15 redeclaring a breach?

16 MR. STOLPER: We are -- we did not previously
17 declare a breach because we didn't believe it was necessary
18 under Paragraph 16.

19 And going back to Mr. Steward's point, the idea
14:56 20 that 16 and 17, if not read together, are a nullity is simply
21 not consistent with the terms of those two paragraphs.
22 Paragraph 16 says what the government can do if the defendant
23 doesn't comply and Paragraph 17 sets forth additional -- I
24 won't say Draconian, but additional remedies available to the
14:56 25 government if the court declares and finds a breach.

1 And so I don't think that his -- his contractual
2 interpretation is correct. Those two paragraphs have -- are
3 distinct and they have distinct meanings and they trigger
4 distinct things the government can and can't do.

14:56 5 But in terms of -- in going back to the court's
6 question about declaring a breach, we did not previously
7 declare a breach, and I think that, as we requested in our
8 papers, that the court should so find a breach based upon the
9 defendant's previous statements in the prior sentencing
14:56 10 proceeding and, I guess, the prior withdrawal proceeding.

11 THE COURT: All right. Anything further?

12 MR. STOLPER: Nothing further.

13 THE COURT: Is the matter submitted by both sides?

14 MR. STEWARD: Yes, Your Honor.

14:57 15 MR. STOLPER: Yes.

16 THE COURT: Mr. Showalter, did you want to discuss
17 anything with Mr. Steward?

18 (Discussion held off the record.)

19 MR. STEWARD: Your Honor, one final point.

14:57 20 THE COURT: Sure.

21 MR. STEWARD: The *Guzman* case out of the Tenth
22 Circuit is clear -- it's out of Circuit authority, but it's
23 clear that the US attorney's office cannot declare a breach
24 unilaterally. And it makes a lot of sense and I would ask
14:57 25 the court to follow that as well.

1 THE COURT: Okay. Is the matter submitted?

2 MR. STEWARD: Yes, Your Honor.

3 THE COURT: Submitted?

4 MR. STOLPER: Yes.

14:57 5 THE COURT: Well, I did find that the defendant did
6 breach the plea agreement.

7 I would have made that finding back at the time
8 prior to sentencing. I do think there is a breach. I think
9 applying contract law into this situation, as I am required
14:58 10 to do, leads to the conclusion that there was a breach by the
11 defendant.

12 For that reason and for the reasons we've heard
13 here presented today, I am going to deny the relief sought by
14 Mr. Steward.

14:58 15 I've also considered Mr. Steward's request that a
16 new judge be substituted for sentencing. I've considered the
17 various reasons why there might be such a request, and I'm
18 going to deny that request.

19 I want to state a few thoughts here now as we
14:59 20 approach the upcoming sentencing.

21 Mr. Showalter, I've thought a lot about your case
22 since you brought your various motions for sentencing. I've
23 thought a lot about your case and the sentencing hearing that
24 occurred.

14:59 25 I must say, I do recall there were lots of people

1 out there and they aren't there now.

2 I do feel that I have to think about the victims;
3 but, nevertheless, I've thought about the arguments you're
4 making. I sometimes wonder if it is fair for us to hold you
14:59 5 to a plea agreement and penalize you when you want to retract
6 the plea agreement.

7 Later events that have occurred in this courthouse
8 that caused me to think more about what happened to you -- I
9 must say, though, that I remain convinced that I need to hold
15:00 10 you to your guilty plea, and there is a couple of reasons for
11 that.

12 One is that you made that guilty plea in my
13 courtroom when you were under oath, and you admitted to the
14 facts when you were under oath. And in that plea we call it
15:00 15 a "plea colloquy." You were told by me, you know, you're
16 under oath, and what you say is important.

17 And to my way of thinking when someone comes into
18 my court and makes a statement under oath, I need to hold
19 them to that statement. I take seriously statements made
15:00 20 under oath.

21 Now, the reasons I made my ruling back then are set
22 forth, I think, in a written order I did -- I believe I did a
23 written order -- and that went up to the Ninth Circuit and
24 we've got the written order, but I want to tell you some of
15:01 25 my thinking on it.

1 The prior opinion is in the written order and I'll
2 stand by my written order; but there was a statement made
3 under oath -- subsequently, I sent the sheriff of
4 Orange County to jail for five and a half years for telling
15:01 5 someone to make a false statement under oath. We had a
6 president who was impeached for making a false statement
7 under oath.

8 I take statements under oath seriously, and there
9 was an admission of the factual basis by you under oath in a
15:01 10 plea hearing which probably lasted at least half an hour and
11 included numerous references to the fact that you were under
12 oath.

13 So that's why I am sticking with the original
14 guilty plea. But as we come up on sentencing, I will say I
15:02 15 think I'm the best person to evaluate the sentencing, and
16 I'll say, to reevaluate the sentencing in light of what the
17 Ninth Circuit has said.

18 I always appreciate it -- and I mean that
19 sincerely -- when the Ninth Circuit provides me with further
15:02 20 guidance on how I can do the appropriate job of sentencing.

21 So I've read the Ninth Circuit opinion, of course,
22 and I continue to think a lot about this case and I want to
23 do what's right in terms of sentencing.

24 I do think I am ultimately, again, the best
15:02 25 judge to do that, considering all the facts that have

1 happened in this case.

2 So we have a date for sentencing; correct?

3 MR. STOLPER: Yes, Your Honor.

4 THE COURT: And what -- have counsel talked about
15:03 5 evidentiary prove-up?

6 I know you have submitted substantial papers
7 proving up what the Ninth Circuit found to be a shortcoming.

8 Have you and counsel talked about how that wants to
9 be handled?

10 MR. STOLPER: We have not, Your Honor; but I'm sure
11 we will do so.

12 We can actually do that now if the court would
13 like.

14 THE COURT: There's the prospects of
15:03 15 cross-examination.

16 MR. STOLPER: Right.

17 THE COURT: I'll leave it at that.

18 There's the prospects of cross-examination.

19 You don't have to discuss it now. You know, make
15:03 20 sure, working with Ms. Bredahl, you set aside enough time.
21 This is obviously important.

22 Again, I'm grateful to have the Ninth Circuit tell
23 me where I need to make further factual findings.

24 And at the sentencing I will consider what evidence
15:03 25 you present, Mr. Stolper, and I will reconsider the overall

1 milieu of this case in determining a reasonable sentence.

2 Mr. Steward.

3 MR. STEWARD: Your Honor, if I may -- and this is
4 probably by way of giving the court a heads up in terms of
15:04 5 the timing of the sentencing. We're about a month off, four
6 weeks right now -- we have been having a lot of difficulty
7 getting cooperation from individuals who need to be giving us
8 some documentation, and the Reader's Digest version of what's
9 going on is we have a list from the government, the FBI
15:04 10 agent, who called each one of the victims and then there is a
11 number to the right of it. As I understand the FBI agent's
12 declaration, he called each one of those folks and said, did
13 you lose a hundred thousand dollars -- let's say,
14 Mr. Smith -- a hundred thousand dollars?

15:04 15 Mr. Showalter and I believe -- and we have some
16 significant evidence already -- that those numbers are
17 incorrect, that many of the victims in this case recouped
18 money, both directly and indirectly, and the FBI's loss
19 amount for each one of them is simply the gross amount that
15:05 20 they gave to the bankruptcy trustee back in 2006 or '07.

21 THE COURT: It sounds to me you may want to have
22 the chance to cross-examine the FBI and put the entire bit of
23 evidence into doubt. That would put it into doubt with me.

24 MR. STEWARD: Yes, Your Honor; and it's actually
15:05 25 more significant than that in the sense that we believe the

1 victims received funds from at least three different sources.

2 First, is each one of the properties, as the court

3 will recall. Let's just say they had a dozen liens on them.

4 At some point that property was sold and somebody got the

15:05 5 funds off of that, and so we believe in that way, that

6 manner, some of these folks got money and it was not

7 disclosed.

8 Second, at least two of the properties ended up the

9 victims owning the property; they got the property, and we've

15:06 10 been diligently searching property records on all 19 pieces

11 to try and determine exactly what happened.

12 Third was litigation directly involved in this case

13 which had to do with the escrow company. The escrow company,

14 Gateway, and I think their subsidiary, Chapman Escrow,

15:06 15 conceded liability and paid out significant sums of money to,

16 perhaps, all of the investors, at least half of them for

17 sure.

18 We have subpoenaed the settlement documents for the

19 four lawsuits involving Gateway, and I know government

15:06 20 counsel's argument will be you can't deduct that off of loss.

21 But after the *United States versus Crandall* case, we would

22 argue that you can and would, and Mr. Stolper is well

23 familiar with that case because he and I litigated it.

24 Anyway, the bottom line is that we believe there

15:07 25 are many victims who recouped money that must be deducted

1 from these numbers, and that will affect the guideline range.

2 Our plan, frankly, is to subpoena probably four or
3 five of the investors who we know we can prove didn't -- did
4 not have the loss that they stated to the FBI; perhaps no
15:07 5 fault of their own, they just weren't asked the right
6 question.

7 And as the court knows --

8 THE COURT: They were also probably angry, which
9 probably helps the position you're asserting.

15:07 10 MR. STEWARD: I have experienced a great deal of
11 that, Your Honor, in representing Mr. Showalter in a very
12 short period of time.

13 Anyway --

14 THE COURT: And that anger could lead to
15:07 15 exaggeration or, let's just say, not giving the benefit of
16 the doubt to Mr. Showalter.

17 MR. STEWARD: Yes, Your Honor; and my point of this
18 story is that we have diligently tried to pull documentation
19 that can prove our position, and we're having trouble getting
15:07 20 it, frankly.

21 The subpoenas that we've issued are not -- are not
22 bearing fruit the way I think they should.

23 THE COURT: Well, they have the power of the
24 United States District Court and I'll do what I need to do to
15:08 25 enforce subpoenas of this court.

1 MR. STEWARD: Thank you, Your Honor. I appreciate
2 that.

3 Perhaps I made the mistake of making the return on
4 the sentencing date, and maybe that's why things are slow,
15:08 5 but I'm going to see if there aren't things I can do to speed
6 it up. And all of this is a prelude into saying that it may
7 be that April 28th is too soon for us despite all of our
8 diligent efforts to gather all of this material, because I
9 believe it will have a significant impact on the guideline
15:08 10 range for Mr. Showalter, and as we've seen it's pretty
11 critical in this -- it's pretty critical in every case -- but
12 particularly critical in this one.

13 THE COURT: So, Mr. Stolper, you just received a
14 Reader's Digest version of what the defense might do.

15:08 15 I wondered if they would be happy cross-examining
16 your FBI agent. There's some hearsay issues there. He now
17 apparently wants to call a random selection and put doubt.
18 So you've got that Reader's Digest version.

19 The long and the short of it, though, is he's
15:09 20 telling us the date may not be right.

21 What's your position?

22 MR. STOLPER: A few things, Your Honor.

23 First of all, the question of loss has gone to the
24 Circuit and come back down. I don't believe that we're going
15:09 25 to -- I don't believe it's proper to reopen that question.

1 THE COURT: Well, wait.

2 Didn't the Circuit say we need a better prove-up?

3 MR. STOLPER: The Circuit said -- the Circuit
4 remanded on the question of victim count. The Circuit did
15:09 5 not -- the Circuit found sufficient evidence on the loss.

6 THE COURT: Okay. That's true.

7 MR. STOLPER: I don't believe -- I don't believe
8 the loss question is in dispute.

9 I don't believe it's -- the government has not
15:09 10 endeavored to reprove loss because that question was fully
11 litigated.

12 THE COURT: I'm sorry. I forgot that distinction.
13 They made the distinction between number and doubt.

14 Mr. Steward, you would agree with that, wouldn't
15:10 15 you?

16 MR. STEWARD: I would agree that that's what they
17 ordered. It was a general remand, not a specific remand, and
18 our position is everything's on the table right now.

19 THE COURT: Okay. I'm glad you reminded me,
15:10 20 Mr. Stolper, the distinction between the number of victims
21 and the amount of the loss.

22 MR. STOLPER: And our position's going to be that's
23 the law of the case and it's not for -- to be revisited; it's
24 been fully and fairly litigated.

15:10 25 As to what the FBI agent --

1 THE COURT: But let's stop there for a moment.

2 MR. STOLPER: Sure.

3 THE COURT: They said that whatever I relied on to
4 determine amount of loss was appropriate.

15:10 5 MR. STOLPER: (Nodded head.)

6 THE COURT: At the sentencing hearing, the original
7 sentencing hearing, Mr. Steward -- or was it Mr. Ezekiel?

8 MR. STOLPER: Mr. Cortez and Mr. Miller.

9 THE COURT: Ezekiel Cortez.

15:10 10 Mr. Cortez could have said we're going to attack
11 those figures concerning amount of loss, and he could have
12 done it at the sentencing hearing.

13 MR. STOLPER: They did.

14 THE COURT: Well, it kind of goes to this issue of
15:11 15 whether there has been a waiver or whatever.

16 Mr. Steward is now saying that's wide open and he's
17 going to attack that.

18 MR. STOLPER: And I -- I understand that's
19 Mr. Steward's position. The government position is
15:11 20 Mr. Miller and Mr. Cortez fully litigated the question of
21 loss and then they didn't like the judge's -- Your Honor's
22 decision and appealed that question, and the Ninth Circuit
23 determined that this court's determination of loss to be
24 correct.

15:11 25 I don't think that's open for revisit, regardless

1 of whether it's a limited remand or a general remand.

2 That's law of the case. That question's been fully
3 litigated and the Ninth Circuit has decided.

4 If Mr. Steward wants to reopen that question, I
15:11 5 suppose he could make -- if there's any procedural hook to do
6 it -- and I'm not saying that there is -- it would have to be
7 perhaps in the form of a motion to reconsider, but even that,
8 how can the Ninth Circuit reconsider its decision?

9 But, Your Honor, that's -- that's a legal question,
15:12 10 and I want to -- until just now I wasn't aware we were going
11 to be litigating loss, and so that's something that obviously
12 we'll have to research and brief, because I'm quite sure that
13 there's -- there's law on this question.

14 In terms of the date, the government's position, as
15:12 15 the court knows for a long time, has been this -- this case
16 was remanded, I believe, last summer, and we filed our
17 sentencing position -- I can't remember the date, but I
18 believe it was well over a month ago.

19 The victims in this case are not here today,
15:12 20 Your Honor, I think, largely because this hearing's been
21 shuffled around quite a bit, but I can represent that the FBI
22 gets called frequently from victims asking to know what the
23 status of this case is and when is Mr. Showalter going to be
24 resentenced?

15:12 25 I don't have to tell the court there's a lot of

1 angry people out there as a result of Mr. Showalter's
2 conduct, and to deny those -- those folks, I think, are
3 entitled to some modicum of a speedy system, and I don't
4 think it's going to prejudice Mr. Showalter in the slightest
15:13 5 given that this case has been on remand for, I don't know,
6 eight months, something like that.

7 The final thing I'll just point out, Your Honor, is
8 that some of the arguments Mr. Steward is making is simply
9 not -- are going to make are simply -- the one that -- the
15:13 10 one that I heard that caught my ear was this idea that --
11 that the escrow company paid out. They did. The escrow
12 company was -- insurance company paid out because the victims
13 had a pretty good argument that they should have detected
14 Mr. Showalter's fraud and did not do so.

15:13 15 Whether it's insurance company money that pays out
16 or whether it's victims who are out the money, the money is
17 still gone as a result of Mr. Showalter's scheme to defraud,
18 and the fact that an insurance company pays out for it is --
19 is, under the law, including *US v. Crandall*, just is not an
15:14 20 offset to fraud.

21 THE COURT: There is no collateral -- you're saying
22 there is a version of the collateral source rule in criminal
23 cases? That's a civil concept. We don't need to go there,
24 but --

15:14 25 MR. STOLPER: You're talking over my head,

1 Your Honor; but the way loss works is, you know, if you steal
2 something from someone and they're lucky enough to be insured
3 for that loss --

4 THE COURT: Another way of saying that, which is
15:14 5 said in the civil context, is that Mr. Showalter should not
6 be the beneficiary of the fact that someone diligently paid
7 insurance premiums over a certain amount of years?

8 MR. STOLPER: Correct; and I guess my cruder way of
9 saying it --

15:14 10 THE COURT: I'm not sure those same policies would
11 apply in a criminal case.

12 You cited a case, and maybe that takes care of it.

13 MR. STOLPER: It's *US v. Crandall*, and I am privy
14 to that case, but it doesn't take care of it.

15:14 15 Anyhow, I think the question before us today is:
16 When are we going to go forward with sentencing?

17 The government's position is the defense has had
18 more than adequate time to prepare. The issue as far as
19 Government's concerned is a question of victim count. That's
15:14 20 the only issue we briefed to Your Honor because that's the
21 issue the Ninth Circuit said was infirm at the last
22 sentencing.

23 On that question, I don't think additional time is
24 necessary to prepare. Mr. Steward isn't arguing those folks
15:15 25 that he called aren't victims; he's arguing that they may not

1 have experienced the amount of loss that was already fully
2 litigated and briefed with the Ninth Circuit.

3 (Discussion held off the record.)

4 THE COURT: Just for the record, that's a
15:15 5 translator who is usually here when we have people who need
6 translations, and I wondered if she thought we had a hearing
7 at 3:00 or something needing a translation.

8 Go ahead.

9 MR. STOLPER: Just to finish up, Your Honor, the
15:15 10 question before the court, I think, is victim count.

11 I didn't hear anything in Mr. Steward's Reader's
12 Digest version that suggested that he had anything -- that
13 had a whole lot to say about victim count.

14 If we're going to have another fully opened
15:16 15 sentencing on stuff that's already been fully litigated and
16 briefed to the Ninth Circuit, then I suppose the government
17 will need more time -- more time as well because we'll have
18 to re-put on the entire sentencing again.

19 THE COURT: Okay. Issue of victim count.

15:16 20 MR. STOLPER: Yes.

21 THE COURT: What's your magic number?

22 MR. STOLPER: More than 50.

23 THE COURT: How many were here that day?

24 MR. STOLPER: How many were here the day that the
15:16 25 court --

1 THE COURT: Sentenced.

2 MR. STOLPER: Oh, I didn't bring that file,
3 Your Honor, but the answer is I don't know offhand. I think
4 it was approximately 50, but I don't know. I can't -- I
15:16 5 don't want to represent that to the court, because I didn't
6 count.

7 I can ask the FBI agent.

8 THE COURT: Okay.

9 MR. STOLPER: What I can tell the court is we've
15:16 10 gone -- we've filed our position on this.

11 I don't think this is a very complex factual
12 inquiry to determine who's a victim and who is not.

13 The law on it's very clear. The folks who invested
14 money and didn't get some portion of it back are "victims"
15:16 15 under the law.

16 If that's what we're litigating, I don't think that
17 any time is necessary.

18 The government set forth its position. Mr. Steward
19 has had ample time to review that position. Now it's time to
15:17 20 resentence the defendant and move on.

21 THE COURT: All right.

22 Mr. Steward.

23 MR. STEWARD: I just want to note a couple of
24 things, Your Honor.

15:17 25 First, I've only been on this case for about

1 60 days. It was remanded from the Ninth Circuit last summer.
2 Mr. Showalter has asked me many times, "Why didn't I have a
3 lawyer before this?"

4 There were problems with somebody CJA appointed
15:17 5 before me, other than that, I don't know, but none of it was
6 his fault.

7 And like I said, as for me, I've been on it 60 days
8 and I've put in a lot of time on a sentencing like this.

9 THE COURT: Let me say, if you're arguing on the
15:17 10 timing issue, don't bother. I will give you all the time you
11 need.

12 Respectfully, Mr. Stolper, I made an error the
13 first time. I'm not going -- I'm going to do my best to
14 avoid making an error this time, and if that requires
15:17 15 additional time, since the defendant is incarcerated, I'm --
16 I will accept reasonable requests for more time.

17 So you don't need to address that, Mr. Steward.

18 MR. STEWARD: Yes, Your Honor.

19 THE COURT: I am wondering if we should avoid
15:18 20 further work by you and further inconvenience and calling
21 victims probably is not a pleasant experience for the victims
22 or for you. Maybe we first need to preliminarily review this
23 issue by briefing.

24 MR. STEWARD: I think that would be helpful,
15:18 25 Your Honor.

1 THE COURT: So if you want to get together and work
2 something out and request briefing and request a hearing on
3 this issue so you will not be bringing folks into court only
4 to have me state that amount is no longer an issue, perhaps
15:18 5 you want to work that out with counsel.

6 Okay?

7 MR. STEWARD: That's fine, Your Honor.

8 THE COURT: What else?

9 MR. STEWARD: The only other thing I was going to
15:18 10 say, and it's more -- it's more properly addressed in the
11 briefing the court's talking about, but we had cited at one
12 point, *US versus Pham*. It's a Ninth Circuit case, 2008, at
13 545 F.3d 712, that talks about a remand in a sentencing where
14 the sentencing is being redone. And the *Pham* case stands for
15:19 15 the proposition that it's really resentencing de novo, as the
16 court indicated, the court wants to do, but the issue is not
17 specifically limited to that which caused the reversal and
18 the remand.

19 And, again, it's the *Pham* case. We can -- I think
15:19 20 it would make sense if we cited that, because it may save
21 everybody a lot of work.

22 THE COURT: Well, I will say that the guidelines
23 and 3553(a) kind of have a holistic approach, looking at the
24 thing -- I think I used the word "milieu" earlier today -- so
15:19 25 I'll be interested in what that case has to say.

1 MR. STEWARD: All right.

2 THE COURT: Just for the record, I've always --

3 I'll just throw this out here -- I had been puzzled by the

4 notion that you sentence a man to X, it goes up on appeal.

15:20 5 The Ninth Circuit says you considered a factor you shouldn't

6 have considered; do not consider the factor. It comes back

7 and you sentence the man to the same X. I think that can be

8 done. But I've always wondered, does that mean you didn't

9 really consider the factor that you shouldn't have considered

15:20 10 or whatever?

11 Now, again, my understanding is I can be told that

12 doesn't -- that doesn't apply to enhancements based on

13 victims and amount, Mr. Steward. I'm not saying that.

14 Let's just say "a factor."

15:20 15 I considered a factor. Not a mathematical figure

16 you're talking about, but I considered a factor, and it comes

17 back to me. And a linear logic would have to say the

18 sentence should be lower, but that's not the case. And I

19 think part of the reason is you do have to have a holistic

15:21 20 approach on the matter.

21 And so those are some of the thoughts I've

22 considered on the matter and maybe this case and others will

23 help me solidify that issue.

24 MR. STOLPER: Your Honor, I'm not sure it will

15:21 25 help, but both Mr. Steward and I -- I'm not sure when

1 Your Honor took the bench, but Mr. Steward and I were both
2 here before *Booker* and before there was the 3553(a) factors
3 with the same force, and I'll just comment that it's a -- it
4 really is a much more complex sentencing process than it used
15:21 5 to be.

6 Mr. Steward will, I think, back me up where it used
7 to be that if you tabulated the guidelines and the court will
8 pick a -- pick a -- in most cases, pick a range -- pick a
9 mid-point, low-end, or high-end, and that was really the
15:21 10 entire sentencing. And I think that in the post-*Booker* era,
11 judges are expected to exercise their discretion independent
12 of the guidelines, which makes these remands, I think, all
13 the more difficult to everyone.

14 THE COURT: I appreciate that insight, and you have
15:22 15 been at this -- both of you have been at this --

16 MR. STOLPER: Too long, Your Honor.

17 THE COURT: -- longer than I. So I welcome any
18 further elucidation you can give me.

19 And I've given you my inclination to provide
15:22 20 further time as needed.

21 I will also repeat, you know, my concern that
22 victims not be contacted unnecessarily, and I think that can
23 be avoided by preliminarily looking at this issue of
24 revisiting the amount after the Ninth Circuit approved of our
15:22 25 earlier decision.

1 All right. So those are all thoughts. I think
2 counsel are going to have to talk to each other and see how
3 they want to set this up.

4 Is there anything further at this time?

15:22 5 MR. STOLPER: No, Your Honor.

6 Thank you.

7 MR. STEWARD: No, Your Honor.

8 THE COURT: All right. Thank you, Counsel.

9 Mr. Showalter, we'll continue to work on this and
15:23 10 try and get the answer right this time.

11 Thank you.

12 (End of proceedings.)

13 ***

14 Certificate

15 I hereby certify that the foregoing is a true and
16 correct transcript of the stenographically recorded
17 proceedings in the above matter.

18 Fees charged for this transcript, less any circuit
19 fee reduction and/or deposit, are in conformance with the
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